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No. 84-649

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BLINDER, ROBINSON & CO., INC.
AND MEYER BLINDER,
Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

REPLY BRIEF

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December 14, 1984

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REPLY BRIEF

Petitioners respectfully file this reply to the Opposition to the Petition for Certiorari filed by the Securities and Exchange Commission ("SEC").

1. Respondent's characterizations of petitioners' positions regarding the district court's erroneous grant of injunctive relief in this case are incorrect. Contrary to respondent's statement (Opp. at 5-6), petitioners have contended, and will continue to contend upon remand, that the evidence before the district court is insufficient to establish the likelihood of future violations by respondents, and that the district court's findings of fact are

insufficient to support such a conclusion.[1] The issue warranting a grant of certiorari in this case is, however, of much broader applicability to a wide range of cases in which injunctive relief is sought by the SEC, other governmental agencies, or private parties: The adherence by the district courts and the courts of appeals to this Court's unequivocal holding that the issuance of an injunction must be predicated on factual findings that there is a reasonable likelihood of proscribed conduct in the future. That requirement was ignored by the lower courts in this case. Only by reaffirming the applicability of this rule will this Court ensure conformance with it.

2. Respondent argues that the district court's finding of a violation of Rule 10b-6 was correct because "[p]etitioners' distribution was not complete at the time of the purported closing of the offering because their own purchase of the units was not for investment, but for the purpose of continued sales to the public." (Opp. at 7.) Assuming that the Commission has correctly stated the law, it is clear that the district court did *not* find a violation on this basis. To the contrary, the court found a violation of Rule 10b-6 solely because (i) Blinder, Robinson purchased 956,393 units,[2] and (ii) the firm "*purchased* and sold a large volume of American Leisure units" in the after-market. (App. 26a, emphasis added.)

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[1] Respondent is also incorrect when it states that petitioners do not contend that the district court was unaware of the correct legal standard for the issuance of injunctions against future violations. Respondents have no basis for making assertions one way or the other about the state of awareness of the district court. Respondents do contend, however, that regardless of the district court's state of awareness, that court and the court of appeals erred in allowing an injunction to issue without the requisite finding of facts to support it.

[2] The court stated: "With its purchase of 956,393 units, it fell short of completing its distribution by that amount and, consequently, the distribution continued after the purported closing." (App. 26a.)

In order to meet the standard set forth by respondent itself, the district court had to find that the firm's purchase of American Leisure units was, in the Commission's words, "for the purpose of continued sales to the public." [3] No such finding was made. Indeed, the district court never even found that Blinder, Robinson's after-market sales exceeded its after-market purchases. Without a finding that petitioners' purpose in purchasing a portion of the offering was not for investment, the rule applied by the district court is, in effect, that any purchase by an underwriter and market maker of part of the offering violates Rule 10b-6. This rule is not only wrong, but it threatens to convert a common practice of underwriters into a newly created violation of the securities laws.

3. Respondent deals with petitioners' contention regarding reliance on counsel by misconstruing it. Petitioners do not suggest that the district court did not find that respondents made a business decision not to "sticker" or update the prospectus in the face of suggestions by some (but not all) counsel that this was advisable. This advice, however, *had no bearing on the determination whether or not to close the issue.* It was this latter determination, *on which there was no contrary advice from counsel in the evidence or found by the district court,* that later formed the basis of most of the securities law violations found by the district court. Petitioners' reliance on counsel with regard to the closing of the offering is manifestly clear from the deposition testimony of one of their attorneys, Mr. Robert Shaftan, who was present

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[3] Petitioners reiterate the point made in the original Petition that a violation of Rule 10b-6 requires a finding of *scienter,* an issue which this Court has yet to address. (*See* Petition at 12-13.) Petitioners' reliance on advice of legal counsel that the distribution of American Leisure units had been completed, discussed in the Petition (at 13-16) and in point 3 below, precludes any *scienter* with regard to purported violations of Rule 10b-6.

at two meetings involving at least four lawyers at which it was determined that the offering could close. Mr. Shaftan testified at deposition that Mr. Bernard Feuerstein, an attorney hired by petitioners for his expertise in the securities area, left no doubt that the closing could go forward:

> "Q: As best you can recall, Mr. Shaftan, what was discussed at that meeting at the Brown Palace [Hotel] regarding the possibility of Blinder, Robinson's purchase of stock?
>
> "A: It was indicated, it was stated that Blinder, Robinson was buying a million shares.
>
> "Q: Who indicated that?
>
> "A: I think [Meyer] Blinder did. And Feuerstein indicated that he had called the S.E.C. and they said it was perfectly all right.
>
> * * * *
>
> "Q: As best you can recall, what did Mr. Feuerstein say regarding this contact with the S.E.C.?
>
> "A: It was more general conversation. But he had called the S.E.C. and it was perfectly all right for Blinder to buy the units.
>
> "Q: Did he say anything else regarding that advice other than what you said, that you can recall?
>
> "A: No.
>
> "Q: Was there any discussion at that time regarding this purchase?
>
> "A: At that time, I don't believe so. The only discussion that involved stickering was when the 90-day period for sending out the prospectus with confirms had to be in. It was the original effective date. That's the only discussion I remember about stickering.
>
> "Q: Was there any discussion at this meeting regarding where the units of the stock from an ac-

counting standpoint would be placed within the firm of Blinder, Robinson?

"A: No.

"Q: Did any other attorney who was present at that meeting render any advice or opinion regarding this subject at that time, or make any comments regarding it?

"A: No one made comments. Bernard Feuerstein was brought in as special counsel.

"Q: Did the discussion of Blinder, Robinson's purchase of American Leisure units come up any other times subsequent to this?

"A: The following day, which was a Thursday, at Metro Bank.

* * * *

"Q: What was said?

"A: Brenman [another attorney] questioned the [propriety] of Blinder buying the units, the one million units.

* * * *

"Q: Was this addressed to some person in particular?

"A: It was—I don't recall. I don't recall. And Feuerstein indicated, as he had the prior night, that he had spoken to the S.E.C., and I don't know whether he mentioned N.A.S.D. or not, but that it was perfectly all right; he had spoken to the S.E.C. on that.

* * * *

"Q: As best you can recall, what did Mr. Brenman say prior to Mr. Feuerstein giving his comments? What did Mr. Brenman say regarding this purchase?

"A: . . . He questioned whether Blinder could buy the securities. And, you know, Feuerstein seemed rather emphatic that it was perfectly all right that he could buy it. You got to recognize Feuerstein was

there as an expert. No one really questioned him. He was the shepherd of the whole case through." [4]

This testimony makes clear the point petitioners have made from the outset: The advice of counsel they received gave them no reason to believe that Blinder, Robinson's purchase of less than ten percent of the offering would prevent the closing of the "all or none" offering. This advice of counsel evidences petitioners' good faith in *allowing the offering to close on that basis, and in assuming in their later actions that the distribution had indeed been completed.* For this reason, the district court erred in finding violations based upon petitioners' awareness that the offering had not, in fact, been completed.

CONCLUSION

For the reasons stated above and in their petition, petitioners pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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December 14, 1984

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[4] Deposition of Robert P. Shaftan, Esq., at 4-9 (May 28, 1981) (*see* Appendix *infra*, at 4a-8a). Mr. Shaftan's deposition testimony, which was contained in Volume XXV of the Court of Appeals record, is included as an Appendix to this Reply. Present counsel have been unable to determine whether this deposition testimony was introduced into evidence at trial.

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 80-M-1125

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

vs.

BLINDER, ROBINSON & CO., INC., *et al.*,
Defendants.

Deposition of ROBERT P. SHAFTAN, taken by Plaintiff and Defendants Blinder, Robinson & Co., Inc. and Meyer Blinder, pursuant to Notice and Subpoena, at the offices of Messrs. Friedman & Shaftan, 4 Park Avenue, New York, New York, on May 28, 1981, at 2:15 p.m.

APPEARANCES:

On behalf of the S.E.C.:

RICHARD S. VERMEIRE, ESQ.,
Trial Counsel
410 Seventeenth Street
Denver, Colorado 80202

On behalf of the Defendants Blinder, Robinson & Co., Inc. and Meyer Blinder:

FISHMAN & GEMAN, ESQS.
2150 Energy Center One
Denver, Colorado 80202

BY: MARC GEMAN, ESQ.

[A] INDEX

WITNESS	EXAMINATION BY	PAGE
Robert P. Shaftan	Mr. Vermeire	2
	Mr. Geman	14

[2]
Whereupon,

ROBERT P. SHAFTAN

having been first duly sworn by the Reporter, was examined and testified as follows:

BY MR. VERMEIRE:

Q Sir, please state your full name and present address for the record.

A Robert P. Shaftan, 7 Prince Edward Road East, Morganville, New Jersey, 07751.

Q Mr. Shaftan, what is your present occupation?

A I'm an attorney.

Q Do you specialize in any particular area of law?

A Primarily a tax lawyer.

Q How long have you been licensed to practice law in the State of New York?

A Since 1964, I believe.

Q You're a partner in the firm of Friedman & Shaftan; is that correct?

MR. GEMAN: Objection.

A Yes.

Q Are you familiar with a company by the name of American Leisure Corp.?

A Yes, I am.

Q How are you familiar with such a company?

[3] A We are presently counsel to the company.

Q When did you become counsel to the company, on or about?

A Well, we were counsel starting in April of '79 until, I guess, October of '79. Then—can this go off the record?

(Discussion held off the record.)

Q It is your recollection that sometime on or about October of '79 that Bernard Feuerstein represented the company in some capacity?

A Yes.

Q To your knowledge, was he considered to be special counsel at that time to the company?

A I think so. I think he was special counsel.

Q At that time did your firm still represent the company as counsel?

A Yes.

Q For the record?

A Yes.

Q Have you continued in that capacity to the present time?

A More or less, yes.

Q Let me ask you this: When was the first time you heard of the possibility that Blinder, Robinson [4] & Co. would purchase stock or units of American Leisure Corp. in the offering?

MR. GEMAN: Objection.

MR. VERMEIRE: Strike the question.

Q Did there come a time that you heard of the possibility of Blinder, Robinson & Co. purchasing American Leisure units in the offering?

A Yes.

Q When was that?

A I don't remember the exact date.

Q Approximately?

A In March of '80.

Q How did you hear that?

A It was in a room in the Brown Palace Hotel in Denver.

Q Who was present?

A Present was Nathan Jacobson, myself, Bernie Feuerstein, Ernie Lampert, Meyer Blinder.

Q Whose room was it?

A It was Nathan Jacobson's room.

Q Why were you in Denver at that time?

A For the closing of the American Leisure offering.

Q Without regard to the date, do you recall [5] what day of the week it was?

A I think it was Wednesday evening. I believe it was a Wednesday evening.

Q As best you can recall, Mr. Shaftan, what was discussed at that meeting at the Brown Palace regarding the possibility of Blinder, Robinson's purchase of stock?

A It was indicated, it was stated that Blinder, Robinson was buying a million shares.

Q Who indicated that?

A I think Blinder did. And Feuerstein indicated that he had called the S.E.C. and they said it was perfectly all right.

Q How did that conversation come up, if you recall?

A I just don't recall. But, you know, it was general discussion, various things about the closing and so on.

Q Was Nate Jacobson present during this discussion?

A Yes, I think so.

Q And Irwin Lampert was also present?

A Yes.

Q Was Greg Scott present during this con- [6] versation?

A I don't believe he was. I know he came in, but I don't think he was present at this conversation. He just came in more or less to say hello, things like that.

Q As best you can recall, what did Mr. Feuerstein say regarding his contact with the S.E.C.?

A It was more general conversation. But he had called the S.E.C. and it was perfectly all right for Blinder to buy the units.

Q Did he say anything else regarding that advice other than what you said, that you can recall?

A No.

Q Was there any discussion at that time regarding any possible stickering prospectus regarding this purchase?

A At that time, I don't believe so. The only discussion that involved stickering was when the 90-day period for sending out the prospectus with confirms had to be in.

It was the original effective date. That's the only discussion I remember about stickering.

Q Was there any discussion at this meeting regarding where the units of the stock from an accounting [7] standpoint would be placed within the firm of Blinder, Robinson?

A No.

Q Did any other attorney who was present at that meeting render any advice or opinion regarding this subject at that time, or make any comments regarding it?

A No one made comments. Bernard Feuerstein was brought in as special counsel.

Q Did the discussion of Blinder, Robinson's purchase of American Leisure units come up any other times subsequent to this?

A The following day, which was a Thursday, at Metro Bank.

Q Who was present at this meeting, Mr. Shaftan?

A Present at the Metro Bank were myself, Irwin Lambert, Bernie Feuerstein, some clerk from the bank who was in charge of escrow, Blinder, Meyer Blinder.

Did I say Irwin Lambert?

Nate Jacobson, Jerry Raskin, and subsequently Brenman and Brenman's son, I think, was there.

Q Whereabouts in the bank—

A It was in a conference room on the second [8] floor.

Q Why were you in the bank at this time?

A We were there for the closing of the transaction.

Q What was said?

A Brenman questioned the priority of Blinder buying the units, the one million units.

Q How did he question it? What did he say, if you can recall?

A He said words to the effect, are you sure he can buy it, it doesn't seem he should be able to.

Q Was this addressed to some person in particular?

A It was—I don't recall. I don't recall.

And Feuerstein indicated, as he did the prior night, that he had spoken to the S.E.C., and I don't know whether he mentioned N.A.S.D. or not, but that it was perfectly all right; he had spoken to the S.E.C. on that.

Q Was there any other discussion at this time regarding that purchase?

A Not that I recall.

Q Did Mr. Brenman respond to this statement of Mr. Feuerstein that he had checked with the S.E.C.?

[9] A I don't recall.

Q Did you express an opinion or comment regarding this purchase in any of the two meetings we've been discussing?

A No.

Q As best you can recall, what did Mr. Brenman say prior to Mr. Feuerstein giving his comments? What did Mr. Brenman say regarding this purchase?

A More the question type. Again, I'm just—from memory. He questioned whether Blinder could buy the securities. And you know, Feuerstein seemed rather emphatic it was perfectly all right that he could buy it. You got to recognize Feuerstein was there as an expert. No one really questioned him. He was the shepherd of the whole case through.

Q You indicated Mr. Brenman questioned it. What do you mean by questioned it?

A He just—you know, more as a question, could you buy it. He wasn't sure in his own mind, apparently.

Q Did he express any doubts whether this could be done?

A Yes, he raised the question and then Feuerstein indicated that, you know, almost offhandedly, [10] that there was absolutely no problem.

Q At this meeting was there any discussion of stickering the prospectus?

A No.

Q Was there any discussion of where the units would be placed within the firm of Blinder, Robinson?

A No.

Q Let me just go back to the meeting the prior day at the Brown Palace. Was it your testimony that Meyer Blinder indicated that the firm was going to buy a number of units or a block of units at that time?

A Well, they were going over the units sold and it was stated that Blinder was buying a million units, I think the number was. And, you know, it was just an offhand-type remark, that this—you know, the impression I got that this already had been discussed and this was a foregone conclusion.

Q Were the mechanics of that purchase discussed either by Meyer Blinder or anyone else at that Brown Palace meeting?

A Not that I recall.

Q Was that purchase discussed, other than the two meetings we've just discussed, was it discussed [11] at any other meeting or any other gathering?

A Not that I was present at, not that I was aware of.

Q How long did you remain in Denver after Thursday?

A I left Thursday about three or four o'clock. And all the documents were held in escrow pending clearance of funds.

Q You mentioned earlier that at the Brown Palace meeting Mr. Feuerstein indicated that he talked with someone from the N.A.S.D. also, is that true?

A I'm not sure. I think he said the S.E.C. and I think he mentioned N.A.S.D., but I couldn't swear to that. But I know the S.E.C. definitely.

Q At the Metro meeting, was Mr. Scott present?

A He was—people were coming in and out. He was present at certain times. The only ones who were really there for the—for the full time were the people I originally mentioned.

Q When you were in Denver during this period of time, were you aware that Irwin Lambert and Nate Jacobson were going to Miami soon after these meetings?

A There was discussion of them possibly [12] going, but nothing definitive.

Q What was that discussion, as best you can recall?

A I don't know if both of them were talking of going. One may have been, the other one might not have been; I don't know. But there was talk of going to Miami.

Q What was said about that?

A They were—there was some fellow there who had a house down there who they were calling. I don't recall his name. And they were speaking to him.

Q For what purpose?

A I don't know.

Q Can you recall the person's name?

A I don't know his name. It—

Q Was it Leon Joseph?

A No, that name wasn't mentioned. It was—

Q Was it Klein?

A Klein, I think so. That name rings a bell.

Q Do you recall when you heard this discussion during the time you were in Denver that week?

A Thursday, it was.

Q Was this at the Metro Bank?

[13] A Yes.

Q Was Meyer Blinder present at that time?

A I don't recall. He might have been. I think he probably was.

Q Did either Mr. Lambert or Mr. Jacobson discuss the purpose of the trip to Miami in your presence?

MR. GEMAN: Objection. It was asked and answered.

A I don't recall. I don't think so. I don't recall.

Q Did anyone discuss the purpose of that meeting in your presence?

A I'm trying to think. It involved purchase of some units, but—

Q American Leisure units?

A American Leisure units. Money to be wired. I don't even know.

Q You mentioned money to be wired. What did you hear about that?

A There was talk of money being wired from various banks, up in Metro.

Q Various banks in Miami?

A I don't know whether it was various [14] banks in Miami, but somehow I connect the two.

Q What did you hear about the money being wired, in particular?

A It was a question of money being wired from banks, and the time difference and how much money was in the escrow account and so on.

Q Who was discussing that?

A The bank was—

Q I'm sorry, the Metro Bank?

A Yes, the clerk from the bank, talking about the money being wired in.

Q Who was he talking to?

A I don't think he was talking—just in general. You know, there was a general conversation going on.

Q Who was present during this conversation?

A Myself, Feuerstein, Lambert, Jacobson, Raskin, Blinder, the clerk from Metro Bank. Again, various people were coming in at various times throughout the day.

MR. VERMEIRE: No further questions.

BY MR. GEMAN:

Q Mr. Shaftan, do you recall when the first discussion about when the 90-day period would be [15] over came up?

A I think it came up the night I was there, Wednesday night.

Q Wednesday night?

A Yes.

Q At the Brown Palace?

A Yes.

Q Who brought it up, do you know?

A It was, again, part of the general discussion. I don't even remember who brought it up. But it was talking about when you had to send out the prospectus with the confirmation and there was discussion—I think Feuerstein took the position that you had to send in from the date of the sticker and Meyer was arguing with him that it should be from the date it became effective.

Q When you say "the date of the sticker," are you referring to the sticker that was put on in February?

A Yes.

Q Concerning Beef & Bison?

A Yes.

Q Was there discussion of another sticker?

A No.

[16] Q Did Irwin Lampert and Nate Jacobson go out to the airport the same time you did on Thursday?

A No.

Q Had they already left?

A No, they were still there. I had left—I was the first one to leave.

Q Did you understand that they also were leaving that day?

A I didn't know when they were leaving.

MR. VERMEIRE: Objection. Did he understand they were leaving?

MR. GEMAN: Yes.

MR. VERMEIRE: I object to the form of the question.

Q Did Mr. Brenman ever mention anything about a new sticker?

A No, not that I recall. He was just there for a very short time. Raskin was primarily in charge of it. Brenman just came by and he was the one who questioned the priority of Blinder buying the units.

Q Did Mr. Raskin mention anything about a new sticker?

A No.

[17] Q Did Mr. Feuerstein mention who he had spoken to at the Commission?

A He may have. I don't recall the name. He may have. I don't recall.

Q Do you recall anything he indicated about that person?

A No, no. Just he had spoken to the S.E.C. and it was all right. I think—he may have mentioned it. I just don't remember.

Q Do you recall whether he mentioned he had known that person prior to—

A No.

Q There was no discussion, no discussion. It was in conversation back and forth. Nothing—more or less that this was an offhand remark. You know, it just stuck with me because . . .

Q Were you back here in your office in New York on Friday?

A No. I went out to Las Vegas Friday. I came to New York and flew out to Las Vegas the following morning, Friday morning.

Q When was the next time you had any discussion with anybody concerning the American Leisure closing?

[18] A When I complained I never got copies of closing documents.

Q When was that?

A Oh, it must have been about a month later.

Q So you never talked with anybody that following week?

A No, I knew that it had closed, but—

Q How did you know that?

A I think I spoke to Irwin Lambert. He said we closed.

MR. GEMAN. I have no further questions.

MR. VERMEIRE: No redirect.

* * * *

(Time indicated: 2:45 p.m.)

ROBERT P. SHAFTAN

Subscribed and sworn to
before me this _____
day of _____, 1981.

_____
Notary Public

[19] CERTIFICATE

I, LORRAINE YERDONEK, a notary public within and for the State of New York, do hereby certify:

That I reported the foregoing deposition in the within entitled matter and that the transcript is a true record of said deposition.

/s/ Lorraine Yerdonek
LORRAINE YERDONEK